PERWIRA AFFIN BANK BHD

v.

TAN AH TONG

HIGH COURT MALAYA, KUALA LUMPUR
HELILIAH MOHD YUSOF J
[ORIGINATING SUMMONS NO: S5-24(31)-1641-87]
24 JANUARY 2003

CIVIL PROCEDURE: *Execution - Order for sale of land by public auction - Order for sale made by judge - Date of auction - Original auction did not take place - Whether registrar has jurisdiction to give new date of auction - Whether registrar erred in refusing to set new auction date - Practice Direction No 2 of 1987 and Practice Direction No 5 of 1989 - Whether consistent with ss. 256-259 of National Land Code*

LAND LAW: *Charge - Auction - Date of auction - Original auction did not take place - Whether registrar has jurisdiction to given new date of auction - Whether registrar erred in refusing to set new auction date*

This was appeal by the appellant/plaintiff against the decision of the deputy registrar in dismissing its application for a new auction date. The said registrar had upheld the contention of the respondent/defendant, in that he did not have the jurisdiction to give a new auction date. He stated that as the first auction dated 11 February 1989 had been fixed by the trial judge but had not taken place, a new date could only be given by a judge pursuant to s. 257 of the National Land Code ('NLC').

The plaintiff based its appeal on three grounds namely that it had adopted the correct procedure regarding its application for a new date; that the objections and/or issues raised by the defendant were *res judicata*; and that the defendant's conduct in raising the said objections were *mala fide*. On the question of procedure, the plaintiff argued that the said registrar's decision was wrong in that he could have set the auction date in the circumstances in light of Practice Direction No 2 of 1987 and Practice Direction No 5 of 1989.

Held:

[1] An order made pursuant to s. 257 of the NLC constitutes an order of a court made under the Rules of the High Court 1980, and "where it is a perfected order" has to be adhered to in relation to the conditions of sale. It follows therefore that in absence of an appeal to set aside the said order on the basis that there is a cause to the contrary, the chargor is compelled

to abide by the order of the property to be sold in accordance with the statutory safeguard on his interest as provided under ss. 257 and 258 of the NLC. And, the subsequent fixing of the auction dates constitutes consequential orders of the original order. (pp 343 g-h & 344 a)

[2] Where an auction pursuant to an order made under s. 257(1)(b) of the NLC does not proceed on the dates fixed, it could again take place with the fixing of a new auction date to be effected by a senior assistant registrar as the senior assistant registrar acts as a delegate for the judge. (p 344 h)

[3] As the Practice Directions referred to by the plaintiff were not inconsistent with the provisions of the Rules of the High Court 1980 and ss. 256-259 of the NLC, they must be complied with, the result of which the registrar is vested with the power to deal with the consequential orders that ought to be made after an order for sale has been made by a judge under s. 256 of the NLC. (pp 346 h & 347 a)

[4] On the issue of *res judicata*, the present facts indicated that when the defendant had appealed against the decision of the registrar regarding the fixing of a new auction date, the defendant must have known that the purpose for which such an application was made was to have a consequential order to be made by the deputy registrar and therefore had the opportunity of contending at that stage that the auction was to be determined by the judge. In failing to do so, the defendant was now precluded from advancing the contention that the matter should now be fixed before a judge. The defendant did not indicate to this court that it had exhausted whatever avenues in relation to the implementation of the original order and therefore its conduct which resulted in the registrar arriving at such a decision was *mala fide*. (pp 354 d-f & 357 b)

[5] There was an abuse of process of procedure when the defendant raised the argument that the auction has to be fixed by a judge. This contention could have been brought up earlier when attempts were made to fix the auction dates. It could be concluded that the defendant's conduct was calculated to impede the execution of the order for sale in a very unreasonable manner. (p 358 c-f)

[6] The deputy registrar had erred in concluding that he had no jurisdiction to fix the auction date. The matter is accordingly to be sent back to the said registrar with the direction to fix an auction date and other related matters in accordance with the provisions of the National Land Code for the purpose of implementing the original order. (p 364 d-e)

[Appeal allowed with costs.]

Case(s) referred to:

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 326 CA ***(refd)***

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC ***(refd)***

Hock Hua Bank Bhd v. Sahari Murid [1981] 1 MLJ 143 FC ***(refd)***

Johnson v. Gore Wood & Co (a firm) [2001] 1 All ER 481 ***(refd)***

Kandiah Peter v. Public Bank Bhd [1993] 4 CLJ 332 SC ***(refd)***

Kuala Lumpur Finance Bhd v. Yap Poh Khian (Teo Sik Eng & Anor, Interveners) [1991] 3 CLJ 1805; [1991] 3 CLJ (Rep) 75 HC ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank [1997] 2 CLJ 36 SC ***(refd)***

M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 SC ***(refd)***

Malayan United Finance Bhd v. Adsonii (M) Sdn Bhd [1990] 2 CLJ 254; [1990] 2 CLJ (Rep) 435 HC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

MUI Bank v. Cheam Kim Yu (Beh Sai Min, Intervener) [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 SC ***(refd)***

NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd [1992] 3 CLJ 1680; [1992] 1 CLJ (Rep) 244 SC ***(refd)***

Northman v. Barnet Council [1978] 1 WLR 221 ***(refd)***

OCBC Bank (M) Bhd v. Kredin Sdn Bhd [1997] 2 CLJ 534 CA ***(refd)***

Pepper v. Hart [1993] 1 All ER 42 ***(refd)***

Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd [1994] 2 CLJ 716 ***(refd)***

Tan Ah Tong v. Perwira Affin Bank Bhd & Ors [2001] 7 CLJ 500 HC ***(refd)***

United Malayan Banking Corp Bhd v. Chong Bun Sun & Another Application [1994] 2 CLJ 673 HC ***(refd)***

Yat Tung Co v. Dao Heng Bank Ltd & Anor [1975] 2 WLR 690 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 4, 16(a)

National Land Code, ss. 253, 256(2), 257(1)(b), 259(2)(c), 266

Rules of the High Court 1980, O. 32 rr. 9, 10, O. 83 r. 1

Other source(s) referred to:

F Bennion, *Statutory Interpretation A Code*, 2nd edn, pp 167-168

Halsbury's Laws of England, vol 16, 4th edn reissue, para 974

Halsbury's Laws of England, vol 37, 4th edn reissue, para 931

NS Bindra, *Interpretation of Statute*, 18th edn, pp 590-591

Practice Direction No 2 of 1987 (High Court)

Practice Direction No 8 of 1987 (High Court)

Practice Direction No 5 of 1989 (High Court)

Practice Direction No 1 of 1992 (Supreme Court)

Practice Direction No 1 of 1995 (Court of Appeal)

For the plaintiff - Leong Wai Hong (Loo Peh Fern); M/s Skrine
For the defendant - CY Ngeow; M/s CY Ngeow & Assoc
For the intervener - KL Wong; M/s KL Wong & Lim

Reported by M Maheswaran

JUDGMENT

Heliliah Mohd Yusof J:

This is an appeal against the decision of the deputy registrar in dismissing the summons in chambers filed by the plaintiff to obtain a new auction date, reserve price and other ancillary orders. About 14 years ago an order for sale ("original order") had been granted on 5 September 1988 whereby the defendant's land held under Grant No. 7188 Lot No. 94 Mukim of Ulu Kelang, Negeri Selangor, which was then charged to the plaintiff was to be sold by public auction to recover the sum of RM4,082,984.91. The original order had also determined that the sale was to take place on 11 February 1989. For reasons which are not known the sale did not take place. In addition it is also to be noted that no appeal was lodged against the original order. Subsequently it transpired that several auction dates had been refixed but no sale was completed as there were no bidders.

The next relevant date to note is 17 October 2000. On that date upon an application made by the plaintiff and in the presence of counsel for both the plaintiff and defendant a new auction date was granted by another deputy registrar then and it was to have taken place on 12 December 2000. That particular order also included a term whereby there was to be a reduction in the reserve price. Consequently the defendant lodged an appeal against that decision of the deputy registrar to a judge in chambers apparently on the basis of being dissatisfied with the reduction of the reserve price. The appeal was heard on 7 November 2000 and the auction date that was scheduled for 12 December 2000 was set aside. The plaintiff was further instructed to submit a new valuation report to support any further application for a reduced reserve price. Pursuant to this decision the plaintiff's solicitor filed a fresh application for directions for the purposes of obtaining a new auction date which was made on 11 January 2002 (encl. 140). The affidavit of the plaintiff filed in support of the application also included a new valuation report with the reserve price being requested to be fixed at RM4,500,000. On 29 July 2002, the deputy registrar heard the application and upheld the arguments advanced by the counsel for the defendant whereby the deputy registrar dismissed with costs the plaintiff's application on the ground that he had no jurisdiction to give a new auction date as the first auction on 11 February 1989 which had originally been fixed by the learned judge Dato' NH Chan (as he then was) was not

proceeded with and as such a new auction date would have to be refixed by a judge pursuant to s. 257 of the National Land Code ('NLC'). The decision of the deputy registrar was as follows:

> Defendan dalam menentang permohonan Plaintif ini menimbulkan isu bidangkuasa saya untuk mendengar permohonan ini. Alasan Defendan ialah, saya tiada bidangkuasa untuk beri tarikh lelongan ini kerana lelongan yang pertama kali ditetapkan oleh Y.A. Hakim, iaitu pada 11 Februari, 1989 telah tidak dijalankan dan dengan itu, tarikh baru lelongan perlu ditetapkan semula oleh Y.A. Hakim menurut seksyen 257 Kanun Tanah Negara.
>
> Saya telah meneliti perkara ini dan bersetuju dengan hujah peguam Defendan ini. Saya hanya boleh menjalankan kuasa di bawah seksyen 259 Kanun Tanah Negara jika lelongan pada 11 Februari, 1989 dijalankan. Dalam kes sekarang, daripada rekod mahkamah, tiada ditunjukkan lelongan awam dijalankan pada 11 Februari, 1989.

No reasons are given for arriving at this decision. Plaintiff's counsel (now the appellant) canvassed three grounds for the present appeal namely:

(i) the procedure adopted by the plaintiff was correct;

(ii) the objections and/or issues raised by the defendant (now the respondent) were *res judicata*;

(iii) the defendant's conduct was *mala fide*.

Question Of Procedure

The counsel for the appellant/plaintiff contended that the deputy registrar had erred in law when he held that he had no jurisdiction to fix a new auction date simply on the ground that the auction as had been fixed originally had not been proceeded with. It was contended that the decision of the registrar was wrong as it would mean that the past and current auction dates fixed by the senior assistant registrar are nullities and would open a serious floodgate problem. Counsel for the appellant/plaintiff also contended that the practice of a senior assistant registrar giving new auction dates, whether the auction date given by the judge was aborted because there was no bidder or vacated because, for example, the advertisement was not done in time or the seal for the order for sale was not extracted, was already based on Practice Direction 2 of 1987 and Practice Direction 5 of 1989. The counsel for the respondent/defendant, however, primarily referred to s. 259 of the NLC which relates to the procedure at sale. Section 259(2)(c) of the NLC provides as follows:

(2) The officer under whose direction the sale takes place shall:

(a) ...

(b) ...

(c) in the absence of any bid at or above the reserve price, withdraw the land or lease in question from the sale, direct that it be put up for auction on a subsequent date, either at the same or at a reduced (new) price, and see that the subsequent sale is publicly advertised in the like manner; ...

According to counsel for the respondent/defendant the provisions of the NLC confer power on a registrar to fix any subsequent auction date only in the case where the auction was carried out on the first auction date as stated in the original order for sale and in such circumstances that there was no bidder at or above the reserve price that was then fixed. According to counsel no auction was carried out on the date that was fixed by the original order for sale which was granted on 5 September 1988 where the auction date was fixed for 11 February 1989. However, the counsel for the respondent/defendant had noted that various applications by way of summons in chambers were filed in order to fix the reserve price and auction dates but they were not completed on account of the absence of bidders. The last auction date which was fixed on 12 December 2000 had been set aside by the order of the judge on 7 November 2000 with the instruction given for the plaintiff to file a new valuation report and on that date **when the order was given no auction date had been fixed by the judge**. That auction date of 12 December 2000 was however vacated on account of the appeal that was filed by the defendant/respondent against the order made by the senior assistant registrar in fixing the auction date. The brunt of the contention of counsel for the respondent/defendant was therefore that it is only the judge who has the power to fix an auction date if no auction was carried out, pursuant to the original order.

The order of the judge made on 7 November 2000 which included the direction to the appellant/plaintiff to file a new valuation report was not for purpose of fixing an auction date but for purpose of dealing with an appeal made by the respondent/defendant against the decision of a deputy registrar who had fixed an auction date on 12 December 2000.

The submission of the respondent/defendant in this case raises questions on the scope of s. 256 of the National Land Code ('NLC') the relevant provisions of which are as follows:

256 Application to Court for order for sale

(1) This section applies to land held under:

(a) Registry title;

(b) the form of qualified title corresponding to Registry title; or

(c) subsidiary title,

and to the whole of any undivided share in, or any lease of, any such land)

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court **in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.** (emphasis added)

(3) On any such application, the Court shall order the sale of the land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

The expression "in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure" establishes the nexus of the provision of the NLC to the Rules of the High Court 1980 ('RHC').

Section 256 NLC has been examined in various decisions and the position of a chargee in respect of an order for sale has also been judicially perused. In *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332, Eusoff Chin J (as he then was) stated as follows:

> The principles governing the matter are well settled by authority and are not open to question. A chargee who makes an application for an order for sale in foreclosure proceedings under s. 256 of the Code does not commence an action. He merely enforces his rights as a chargee by exercising his statutory remedy against the chargor in default. The chargee, therefore, does not sue for a debt. It is also clear that his claim for an order for sale is not based upon a covenant but under the registered charge. The order for sale when made under s. 256 of the Code is not a judgment or a decree. The court hearing the application for foreclosure does not make, and in any event ought not to make, any adjudication upon any substantive issue. These principles are called from several decisions of our courts which have correctly stated the law upon the subject. In *VRKRS Chettiappah Chetty v. Raja Abdul Rashid Ibni Almarhum Sultan Idris*, the appellant (chargee) had taken a summons under s. 149 of the Land Code 1926 for an order for sale of the charged premises. The respondent pleaded that he could not be sued because there was an Order in Council dated 8 January 1888 which stated:

> No Member of the Royal Family of Perak (Waris Negeri) is liable to be sued for debt in any of the Courts of the State, except by permission previously obtained from Her Majesty's Resident.

Apparently no permission had been obtained as required by the Order in Council. Thorne Ag CJ in the Court of Appeal held (at p. 19):

> It is to be noted that the legislature in its wisdom had provided that the chargee may not exercise his rights against the charged lands without first establishing that default had been made by the chargor, and calling upon the chargor by a summons to show cause why the charged premises should not be sold. That in effect is an application by the chargee for liberty to exercise his rights as chargor *(sic.)* against the charged premises. All that the court has to do on such an application is to satisfy itself that the requirements of the law have been complied with, and that default has been made by the chargor.
>
> ... I am of opinion that the notification has no application whatsoever to the case of the chargee's application under s. 149 of the Land Code. The applicant does not commence an action or suit and does not file a plaint. He does not therefore 'sue' in the ordinary acceptance of that term. Certain it is that the chargee does not 'sue for debt', but he applies for leave to exercise his rights as a chargee. **The proceedings result not in a judgment or decree, but in making or refusal of an order of sale.** (emphasis added)

That decision was followed in *Murugappa Chettiar v. Lechumanan Chettiar*, *Mercantile Bank of India v. TF Egan & Anor*, and *Malaysian International Merchant Bankers Bhd v. Dhanoa Sdn Bhd*.

However, another aspect concerning the order for sale which is made by a court has also been the subject of interpretation in *M & J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15. In that case the issues were:

> (i) whether in a sale of land in a public auction, the sale is completed at the fall of the auctioneer's hammer; (ii) whether the court has the power to extend time for a defaulting purchaser to complete the sale and purchase agreement after the agreed date of completion had passed; and (iii) whether in the event of a negative answer to either circumstance above, the High Court was empowered to make the order as it did. It was contended on behalf of the appellant that the trial judge could not have made the order as he did because at the fall of the auctioneer's hammer in a public auction, the sale was completed and whatever proprietary rights which belonged to the chargor had come to an end.

While the court was also examining the scope of the term "sale concluded, conclusion of sale and sale shall be completed" as used in ss. 259(2) and 266 of the NLC, the court also addressed various aspects of the scope of s. 256 of the NLC in relation to the position of the chargor as well as the exercise of the statutory power of the senior assistant registrar (SAR). However, in that case the facts concerned indicated that the SAR allowed an extension of time for the payment of a total purchase price whereby a deposit was to be made under the conditions of sale. The balance of the purchase price was not completed within thirty days from the date of sale and an order was obtained from the SAR for the completion date to be extended. There was thus in that case a variation of a condition of sale. In examining the provisions, Wan Yahya SCJ (as he then was) made references to various decisions where the provision of the NLC relating to the position of chargor was also cited.

The position of an order under s. 256 has been indicated as follows (p. 20):

> The court makes an order for sale at the request of the chargee after the chargor has failed to satisfy the court of the existence of a **cause to the contrary**. The **order provides for certain conditions and procedures to be followed at the sale.** The chargee's participation in this instance is only confined to the preparation of the conditions of sale in terms of the order and the production in court of the issue documents of title – see s. 258(2) of the NLC. On the other hand, the chargor is prevented by the court's order from denying the chargee's statutory right of sale, but he may nevertheless exercise **his right as a proprietor to dispute any impropriety or anything done in breach of the statutory conditions of sale**. In any event, s. 267(1)(a) of the NLC, which provides that the passing of the interest in the proprietary right from the chargor to the purchaser would occur on registration and after the issuance of a certificate given under s. 259(3)(a), clearly negates any such judicial proposition that the chargor abdicates his proprietary rights at that stage of the auction sale. (emphasis added)

This case also examined the power of the SAR but in that context in relation to the power of the SAR to extend time. The court, in that decision, examined certain aspects which are relevant here in relation to the scope of the exercise of the powers of the SAR (p. 20):

> The second issue raised in this appeal, ie on the power of the SAR to extend time in favour of a defaulting purchaser, has been dealt with in several High Court judgments other than the present judgment on appeal. However, the circumstances affecting these cases differ slightly from case to case. *Malayan United Finance v. Liew Yet Lan* is an application by a chargee against the order made by the SAR extending time in favour of a defaulting purchaser. In that case, VC George J held that the chargee is to be regarded as a vendor and the conditions of sale as the sale and purchase agreement. However, the

learned judge went on to hold that where either the conditions of sale or the NLC contain no provisions empowering alterations to be made to the conditions, then the SAR shall have no power to alter the original date specified in such conditions so as to extend time of completion. It is not mentioned and we can only assume that the chargor was not made a party to the proceedings.

Barely a year after that, in the same court in Johor Bahru, a decision on a somewhat similar subject was made in *Development & Commercial Bank Bhd JB v. Kim Ming Choon*. In that case, an application to extend time to pay the balance of the purchase money was made *ex parte* before the SAR by the purchaser. Neither the chargee nor the chargor were notified of the application. James Foong JC (as he then was) in applying the rationale of *Malayan United Finance Bhd*'s case that the chargor 'abrogates' his rights to the chargee, went on to say that the charger's rights are restored once the sale is aborted. The learned judicial commissioner agreed with *Siland Sdn Bhd & Anor v. M & J Frozen Food Sdn Bhd & Anor* (the present case on appeal) and proceeded to express his view that the SAR has no power to vary the order for sale issued by a judge. Any variation of such order must be heard before a judge.

The overall position indicates that the sale of charged land may be set aside not only in cases involving corruption, collusion or fraud but also in cases where the sale is tainted with impropriety. Wan Yahya SCJ in *M & J Frozen Food Sdn Bhd*, in mentioning the judgment of Lim Beng Choon J (as he then was) in *Kuala Lumpur Finance Bhd v. Yap Poh Khian (Teo Sik Eng & Anor Intervener)* [1991] 3 CLJ 1805; [1991] 3 CLJ (Rep) 75, went on to state (p. 21):

On the issue of extension of time to the defaulting purchaser, he held that the SAR had no right to do so without the consent of the chargee. It would appear from this judgment that the learned judge recognized the charger's right to set aside the sale in cases of fraud, collusion or impropriety although he was not a party to the sale and purchase transaction.

Wan Yahya SCJ also went on to refer to various other cases as follows (pp. 21-23):

The most recent case on this subject is reported in *Public Bank Bhd v. Phan Seng Kee & Ors*. Peh Swee Chin J (as he then was) expressed the position of the chargee as follows:

In my view, the chargee had a statutory right of sale subject to judicial leave. Please see *Suppiah v. Ponnampalam* [1963] MLJ 202. The chargee must be regarded as a vendor, please see *Lim Beng v. AVA Alagappa Chetty* [1922] 1 FMSLR 264; *Malayan United Finance Bhd, Johore Bahru v. Liew Yet Lan* [1990] 1 MLJ 317; *Siland Sdn Bhd &*

Anor v. M&J Frozen Food Sdn Bhd & Anor [1990] 2 MLJ 502. The auction being a judicial sale would be under discretion of the court, and also would be under such direction, in any event, by s. 257 of the National Land Code.

The learned judge held that with the chargee assuming the place of the vendor and the purchaser as the successful bidder, they were in a position, as two contracting parties, to alter the contract of sale, ie with the approval of the court. In doing so, the court has to consider the interest of the chargor.

Three subsidiary issues arise from this power to extend time. Firstly, is the chargor a necessary party to this application for extension of time before the SAR or the judge. Secondly, is his consent or his interest relevant towards considering that application. Thirdly, can the SAR or judge vary the condition of sale in the absence of and/or without the consent of the chargor.

VC George J is of the view that such variation cannot be done without the consent, and impliedly, in the absence of the chargee. He was silent on the rights of the chargor probably for reason of his earlier finding that the chargor had abdicated his rights to the chargee. James Foong JC however, held that although the chargor has abrogated his rights to the chargee, the former's rights are restored by the chargee's breach of the conditions of sale. Although the learned judicial commissioner commented on the chargor's rights being completely ignored, he made no finding on the issue. Likewise, Lim Beng Choon J in holding that the chargor can intervene to set aside an improper sale, made no mention as to whether the SAR's failure to include the chargor at the hearing of the application to extend time is tantamount to a denial of the chargor's right or an act of impropriety. Peh Swee Chin J while holding that the chargee and purchaser possess the right to alter the conditions of sale, they must in seeking the approval of the court notify and hear the chargor. He appears to be of the view that once this has been complied with, and the court has considered the chargor's interest, his consent is immaterial. In *Siland*'s case (present case on appeal), Richard Talalla JC (as he then was) held that an extension of time without reference to the chargor is an abrogation of the chargor's right.

Be it so, one common principle of law emerges from these judgments and that is the chargor's proprietary right is not entirely extinguished and so he is entitled to make an application to set aside an improper sale. We are not prepared to construe that a chargor is divested of his proprietary rights at the fall of the hammer nor are we disposed to interpret the complete surrender of his rights to the chargee at the making of the order of sale so as to deprive him of the rights to challenge the propriety of the sale. As mentioned earlier, the divesting of the chargor's right occurs only on completion of the contract of sale and conveyance when the chargor becomes a constructive trustee for the purchaser.

In the *Malayan United Finance Bhd v. Tan Lay Soon*, Jemuri Serjan SCJ (as he then was), sitting in another panel of this court elucidated the respective interests of the chargor and the chargee in respect of a charged land as follows (at p. 507):

> Under the National Land Code the interest in the land subject to a charge does not vest in the chargee but, upon registration of a charge, it tenders the land subject to the charge liable as a security only in accordance with the provisions of the charge, express or implied (s. 243). Under s. 244(1), the chargee is entitled to the custody of the issue document of title so long the liability stays under the charge. There is no statutory provision for the discharge of the charge by the chargor but his right and that of a borrower to do so is embodied in the provisions of the charge itself. See cl. 3(ii) of the annexure to the charge and s. 249(1) of the National Land Code. However, under s. 266(1) any chargor may at any time before the conclusion of a judicial sale of a charged land tender the amounts due to the registrar of the court or the collector and the amount sufficient to cover all expenses in connection with the judicial sale. Since the right or interests in the charged land remains with the registered owner he has nothing to redeem.

The chargor does not abrogate all his rights to the chargee at the making of the order for sale. **He is merely compelled to abide by the court's order for his property to be sold in accordance with the statutory safeguards on his interest as provided under ss. 257 and 258 of the NLC**. He is a necessary party to the application for sale and must be served with a summons or writ in the manner provided under O. 83 of the Rules of High Court 1980 in respect of an application under s. 256, and, with a summons as provided under s. 261(1)(c) of the NLC in respect of an application under s. 260 of the NLC. Even after the order of sale has been made and when the auction sale is already in progress, but before a bid has been accepted, he still retains the right to tender payment of the amount which he owes the chargee (which may be less than the value of the land on sale) and call off the sale – s. 266 of the NLC. The exercise of such rights do not appear to us to be consistent with a proprietor who has surrendered absolutely his rights over the land to another.

The order for sale confers on the chargee only the statutory rights to a judicial sale. A sale under s. 256 or s. 260 of the NLC is a judicial sale ordered by court on the application of the chargee. The chargor, who has until that stage not been divested of his proprietary rights, may intervene to set aside the sale in the event of fraud, impropriety **or the breach of any statutory or contractual terms of the sale.** We agree that the terms or conditions of sale may be varied, if having regard to the interest of both the chargor and the chargee, it is fair to do so; but the sale being a judicial one, has to be done by the court after giving the chargor the right to be heard. As the court's

power to order the sale, including the authority to fix the price and conditions of sale, is derived from the statutory provisions of the NLC after giving the chargor the right to be heard, it is manifest that any alteration to the terms or conditions must likewise be exercised.

We considered any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor is *ultra vires* the authority to sell under the NLC. Therefore we would, in answer to the second issue raised, say that as the alteration of the completion **date was made without giving notice to the chargor, the subsequent order made by the SAR** was void as being *ultra vires* the NLC.

The cases above have been cited to elucidate the explanation that have been judicially given in respect of the application of s. 256 where the order applied for under s. 256 of the NLC is actually given under the circumstances of the present case pursuant to O. 83 r. 1 of the RHC. As a consequence it is necessary to examine the provisions of s. 257 of the NLC which prescribe as follows:

257 Matters to be dealt with by order for sale

(1) Every order for sale made by the Court under section 256 shall (be in Form 16H and shall):

(a) provide for the sale to be by public auction;

(b) require the sale to be held on, or as soon as may be after, a date specified therein, being a date not less than one month after the date on which the order is made;

(c) specify the total amount due to the chargee at the date on which the order is made; ...

(d) require the Registrar of the Court to fix a reserve price for the purpose of the sale, being a price equal to the estimated market value of the land or lease in question (; and)

((e) specify that no bidder shall be allowed to bid in the sale unless the officer of the Court is satisfied that the bidder possesses, at the time of the sale, the sum equivalent to ten per centum of the reserve price specified under paragraph (d);)

((f) specify that where the full amount of the purchase price is not paid after the fall of the hammer by the successful bidder, the sum specified in paragraph (e) shall be paid as deposit to the chargee and forthwith credited into the account of the chargor pending the settlement of the balance of the purchase price;)

((g) specify that the balance of the purchase price shall be settled on a date not later than one hundred and twenty days from the date of the sale and that there shall be no extension of the period so specified; and)

((h) specify that where the balance of the purchase price is not settled on a date specified under paragraph (g), the sum paid as deposit under paragraph (f) to the chargee shall be forfeited off in the manner specified under section 267A.)

(2) Any such order may contain such other directions with respect to the sale as the Court may think fit, and in particular (but without prejudice to the generality of the foregoing) may, where the charge in question relates to more lands or lease than one, direct:

(a) that they be offered for sale individually, and in specified order, and

(b) that, in the event of the price fetched by one or more of them exceeding an amount specified in the order, or to be determined by the Registrar of the Court, the other or others shall be withdrawn from the sale, and shall cease to be subject to the order.

(3) In specifying or determining any amount for the purposes of paragraph (b) of subsection (2), the Court or the Registrar, as the case may be, shall have regard not only to the liability of the chargor under the charge, but also to any liabilities which (under section 268) will fall to be discharged out of the proceeds of sale in priority thereto.

Section 257 has been a subject of an amendment whereby various provisions have been added on to the original s. 257(1). In addition every order for sale to be made by a court under s. 256 shall be in Form 16H and Form 16H constitutes part of the Schedule to the Act. However, that amendment did not change what has been stipulated in the original s. 257(1)(d) where it is stated that every order for sale made by a court under s. 256 which shall be in Form 16H shall require the registrar of the court to fix a reserve price for the purpose of the sale. Section 257 has also to be read with ss. 258 and 259 of the NLC as these two provisions provide the statutory processes by which the sale that has been ordered by the court under s. 256 are to be proceeded with. In this respect it is to be noted that the term "court" has been used in ss. 256 and 257 as well as s. 259 but it is to be further noted that in context of the same sections, specific references are also made either to the court or the registrar of the court. Under s. 5 of the NLC on interpretation the term "court" has been defined to mean the High Court in Malaya. Thus in the context of s. 258 a specific reference is made to the duty of the registrar of the court to observe certain processes after an order for sale has been made and similarly under s. 259 it is stipulated that every sale pursuant to an order under s. 256

is to take place under the direction of an officer of the court. The framework of the statutory process for the purposes of implementing the order for sale has expressly indicated that the officer of the court and not the judge is vested with the statutory powers to implement the order for sale.

The contention of the respondent/defendant in this case both in the written form as well as in the oral submission is to the effect that the power given to the registrar or officer of the court to fix any subsequent auction date is only where the auction has been carried out on the first date that was stated in the original order for sale. Reference was made to the decision in *NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd* [1992] 3 CLJ 1680; [1992] 1 CLJ (Rep) 244. In that case the High Court had ordered that a piece of land charged to the respondent be sold by public auction under the NLC. Eight auctions were held but they were not successful because there were no bidders. The reserve price at the last auction was RM4.63 million. The respondent applied to the SAR to fix a new reserve price and the next date of auction sale. The respondent produced a valuation report which showed the estimated open market value of the land to be RM5.7 million and the estimated forced sale value to be RM4.02 million. The SAR fixed the reserve price at RM5 million. The appellant appealed to the judge in chambers who confirmed the order of the SAR. The appellant appealed to the Supreme Court and the respondent filed a notice of cross-appeal. The then Supreme Court in the course of delivering its decision indicated that the High Court had ordered that the land which was charged to the respondent was to be sold by public auction and subsequent thereto eight auctions were held but the auctions were not successful because there were no bidders. The respondent then took out a summons for direction for the SAR to fix a new reserve price and the next date of auction sale. The decision in the *NKM Properties*' case pertains to fixing of the reserve price but what is noticeable is that it was not an issue in that case that there was a date of auction sale that was fixed by the SAR in addition to a new reserve price.

This aspect forms the crux of the contention of the respondent/defendant in the present case before me. According to the submission of the respondent/defendant, the situation is different if no auction was carried out at all but the respondent/defendant did indicate that a few applications by way of summons in chambers were made to fix the reserve price and auction date and the last auction date that was fixed on 12 December 2000 had been set aside by an order of the judge on 7 November 2000 and yet in that order no auction date was fixed by the judge. The argument of the respondent/defendant was that since the original auction date that was fixed had not been carried out, the officer under whose direction a sale has to take place could no longer exercise the statutory powers vested in it to continue fixing an auction date as though

the officer's powers had been exhausted as a result of there being no auction being undertaken pursuant to the first order that was made by the judge on 5 September 1988. The argument of the respondent/defendant means that if an auction date had been fixed and at that particular date an auction had been carried out but there was an absence of bidders then the officer would be entitled to withdraw the land in question and direct that it be put up for auction on a subsequent date. But if no first auction was carried out as originally fixed in the first order then the registrar would not be in a position to fix an auction date.

Sub-section 257(1) does indicate that an order for sale made by the court under s. 256, in addition to being in Form 16H shall, *inter alia*, provide for the sale to be by public auction and that sale is to be held as soon as may be after a date specified therein. In this case there was an auction date specified in the original order that date being 11 February 1989.

The argument of the respondent/defendant in this case also necessitates a further dwelling on the question of the effect of an order once it has been made pursuant to s. 256 of the NLC. In so far as the effect of the order having been made counsel for the appellant/plaintiff has referred to decisions of the Supreme Court in *MUI Bank v. Cheam Kim Yu (Beh Sai Ming, Intervener)* [1992] 4 CLJ 2229; [1992] 1 CLJ (Rep) 222 Supreme Court decision where Harun Hashim SCJ (as he then was) in delivering the judgment of the court, stated:

> True, after making an order for sale, the judge has the power to make other orders, including changes in the reserve price and the auction sale dates, but such orders are consequential to the order for sale. The point here is that the order for sale is a final order unless appealed against. Once the order for sale is made, drawn up and perfected, as here, the learned judge is *functus officio* and therefore has no power to set aside the order for sale.

In this *MUI Bank*'s case, Harun Hashim SCJ had made a reference to another case namely the case of *Hock Hua Bank Bhd v. Sahari bin Murid*, a Federal Court decision reported in [1981] 1 MLJ 143. The headnotes are as follows:

> In this case the learned judge had made an order for sale in a foreclosure proceeding. The order was made after hearing all the parties and was made despite a claim of *non est factum* and allegations of fraud and forgery by the respondent. The order was drawn up and perfected. There was no appeal against it. The respondent applied to set aside the judgment and this application was refused. Subsequently the respondent applied again to set aside the previous order. The learned judge thereupon set aside his order. The appellant appealed.

Hock Hua Bank's case decided in favour of the appellant and it was held, *inter alia*, that the learned judge who had made an order for sale in a foreclosure proceeding was *functus officio*. It was pointed out in this case that the learned judge who made an order would have no jurisdiction to set aside his own order and the original order must be restored.

Thus, on basis of the two cases cited above, in so far as the decision of the learned judge that was made fourteen years ago granted on 5 September 1988, the order would still stand. However, the point in issue in the present matter is whether it is incumbent that any further subsequent orders pertaining to changes in the implementation of the original order would have to be adjudicated only by a judge. It would appear that Harun Hashim SCJ in the *MUI Bank*'s case had alluded to that point in his judgment as stated above, that after making an order a judge has the power to make other orders including changes in the reserve price and the auction sale date. But as also stated such orders are consequential to the order for sale. Therefore the point for consideration is whether any such order concerning changes in the reserve price and the auction sale *date must necessarily be determined only by a judge and a registrar of the court would be precluded from doing so and if a registrar of the court were indeed to determine an auction date where as in this case the auction was not carried out in the first place it would render the exercise of that power of determining the date of auction ultra vires the NLC.*

It becomes therefore relevant at this stage to examine the submissions of both counsel for the appellant/plaintiff and the respondent/defendant relating to the Practice Directions that have been made and are still applicable to the steps that are to be taken after an order for sale has been made. Two Practice Directions have been referred namely Practice Direction No. 2 of 1987 and Practice Direction No. 5 of 1989. The Practice Direction No. 2 of 1987 is set out in full as follows:

> It has been brought to the attention of the Honourable Chief Justice Malaya that a practice existed in some High Courts for the senior assistant registrar instead of the Judge to make orders for sale of land/lease and deal with matters consequential thereto. Such a practice is contrary to section 257 of the National Land Code 1965.
>
> 2. The Honourable Chief Justice Malaya thereby directs that henceforth the practice shall be for the Judge of the High Court to make the orders as prescribed in paragraphs (a), (b) and (c) of subsection (1) of section 257; the order for sale shall provide for it to be held by public auction on a date to be specified therein being a date not less than one month after the date of the order with the total amount due to the chargee as at the date of the order duly stated. The Judge shall also make an order that the reserve price and other directions with respect to the sale be made by the senior assistant registrar.

(3. In the event a new date of sale is required to be fixed, the same shall be dealt with by the Judge himself.)

(Zainal Abidin Bin Mohd Wazir)
Registrar,
High Court Malaya,
Kuala Lumpur.

The next Practice Direction namely No. 5 of 1989 is also set out in full as follows:

It has been brought to the attention of the Honourable the Chief Justice, Malaya that a number of auctions pursuant to orders made under section 257(1)(b) of the National Land Code 1965 do not proceed on the dates fixed for a variety of reasons. As a result, numerous applications are made in the civil and execution divisions for new auction dates.

2. In order to expedite the fixing of a new auction date by the senior assistant registrar, the Honourable the Chief Justice Malaya directs that paragraph 3 of Practice Note No. 2 of 1987 and Practice Note No 1 of 1988 be cancelled with immediate effect.

3. The current practice of the Judge specifying the auction date when making the order for sale shall continue, in order to comply with section 257(1)(b) of the National Land Code 1965.

(Hasan bin Lah)
Registrar,
High Court,
Kuala Lumpur.
22 November 1989.

The counsel for the respondent/defendant in addressing the effect of these Practice Directions has drawn my attention to the decision of the Federal Court in the case of *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645.

While the facts of this case are not relevant to be mentioned, the decision has been cited by the counsel for the respondent/defendant presumably having relied strongly on the effect of Practice Direction where the Practice Direction in that case was the Court of Appeal Practice Direction No. 1 of 1995 which is a modified version of the Supreme Court Practice Direction No. 1 of 1992. The status of Practice Direction was the subject addressed by Steve Shim CJ (Sabah & Sarawak) where at p. 403 of the judgment, his Lordship stated as follows:

> In *Ooi Bee Tat v. Tan Ah Chim & Sons Sdn Bhd & Anor and Another Appeal* [1995] 4 CLJ 484, it was held that practice directions were effected for administrative purposes. I accept that as a correct statement of the law. Undoubtedly, they provide guidelines for a more effective implementation of the rules of court. They seek to clarify or highlight such rules. They may even, to some extent, modify them, but certainly they are not meant to supersede or deviate from court rules which have been statutorily laid down. To do so would, in my view, be a negation of the authority of Parliament which has conferred powers upon the Rules Committee under s. 17 of the CJA to make the rules of court.
>
> It is true that the Chief Justice has been empowered under r. 110 of the RFC to issue practice directions. So has the President of the Court of Appeal under r. 77 of the RCA. Nevertheless, it cannot have been in the contemplation of Parliament that they can issue practice directions in direct conflict with procedural rules of court which have been statutorily laid down. In my view, to the extent that such practice directions are in conflict, in the sense of superseding or deviating substantially from statutory rules of court, they are of no legal effect whatsoever. Of course, once practice directions have been properly and legally issued, they must be complied with. I believe that to be trite (see *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 CLJ 628; *Raja Guppal a/l Ramasamy v. Sagaran a/l Pakian* [1999] 2 CLJ 972).

There is another Practice Direction which is intended to deal with the enforcement of a judgment in foreclosure proceedings that is Practice Direction No. 8 of 1987 which is as follows:

> The Honourable the Chief Justice directs with immediate effect that the procedure to be followed in enforcing the judgment in foreclosure proceedings in the High Court at Kuala Lumpur shall be as follows:
>
> 1. On extraction of the fair orders in foreclosure proceedings from the Civil Division, two copies of the order for sale and one copy of the order for directions accompanied by the valuation report shall be filed at the Registry of the Enforcement of Judgments Division.
>
> 2. On presentation of the said orders at the registry, it shall be registered as an application for execution.
>
> 3. All subsequent proceedings in the aforesaid foreclosure shall be dealt with by the Enforcement of Judgments Division. All correspondence and enquiries arising therefrom shall be directed to the Enforcement of Judgments Division (Attention: The Deputy Registrar) and quoting the application for execution reference number.

(Zainal Abidin bin Mohd Wazir)
Registrar,
High Court Malaya.
12 November 1987.

If Practice Directions had in any way been inconsistent with any provision of the Rules of the High Court 1980, to my mind, it has not been contended in that manner by the counsel for the respondent/defendant. Section 256 of the NLC in reference to an application for an order for sale had by sub-s. (2) specifically provided that the application by a chargee for an order for sale shall be made in accordance with the provisions for the time being in force of any law relating to civil procedure. The procedure that has been invoked in this case is an application under O. 83 to which the respondent/defendant was made a party. Order 83 r. 1 was a process that had been invoked. The schematic inter-application of both the NLC and the RHC have been carefully elaborated in detail in the decision of Visu Sinnadurai J (as he then was) in *United Malayan Banking Corp Bhd v. Chong Bun Sun and Another Application* [1994] 2 CLJ 673. In that case his Lordship examined the provisions of s. 253, the need for the chargee to comply with the requirement of O. 83 of the RHC as well as s. 256 and the direction for sale which are to be made under s. 257 at p. 676 his Lordship stated:

> It is clear from these provisions of the NLC that the law confers a special statutory right on the chargee to obtain an order for sale. This right of the chargee is independent of any other causes of action which the chargee may have against the chargor under the charge, or under any other law.

Further on in his judgment (at p. 677) the learned judge also dwelt on the sale by public auction.

> Sale by public auction
>
> Where an order for sale has been ordered by the court, certain practical problems, may arise, as is the situation in these two applications before this court, when there is no bidder at the public auction to purchase the property at the reserved price fixed by the registrar, and as a consequence, the property remains unsold. In such cases, the general practice has been for the chargee to make an application to the registrar to revise the reserved price, and if the registrar is so satisfied, a new reserved price is then stipulated and another public auction is conducted (as to the powers of the registrar to fix a new reserve price, see *NKM Properties Sdn Bhd v. Rakyat First Merchant Bankers Bhd*). Following this procedure, in one of the cases before this court, six public auctions were conducted, and all of them proved to be abortive.

> Strictly speaking, of course, under s. 259(2)(c), the reserve price may be reduced to any amount, so as to enable the chargee to dispose of the property at subsequent public auctions. Unlike a public auction conducted by the land administrator under s. 265(2), where only two public auctions may be conducted, there is no limit stated in the NLC as to the number of public auctions which may be conducted in respect of an order for sale made under s. 257. However, if the reserve price is reduced to too low a sum, it may adversely affect both the chargor's and the chargee's rights.
>
> But difficulties may still arise, when after a series of public auctions, the property remains undisposed of. It is in these circumstances that the chargee applies to the court to set aside the earlier order for sale and seeks a new order that the said property be sold by way of private treaty.

The counsel for the respondent/defendant had not indicated any judicial authority to indicate that the practice of fixing various auction dates on an application made by the chargee should only be determined exclusively by a judge. An order made pursuant to O. 83 is the order that is made for the purposes of an order for sale under s. 256. The RHC has been made under s. 16(a) of the Courts of Judicature Act 1964 ('CJA'). Section 4 of the CJA states:

> In the event of inconsistency or conflict between this Act and any other written law other than the Constitution in force at the commencement of this Act, the provisions of this Act shall prevail.

The RHC is a subsidiary legislation made under the CJA and O. 83 and as has been indicated in the *United Malayan Banking*'s case, is the order where procedural rules are set out for the foreclosure proceeding of charged property and in this case the chargee had complied with the procedural rules set out under O. 83 in obtaining the original order. The question that arises is whether the Practice Directions are in any way in conflict with the provisions of the NLC.

The adjustment of a date for the auction to be carried out is not, to my mind, an alteration of a condition of sale made in the original order. In furtherance of an order made pursuant to O. 83 that is the making of an order for sale, certain terms and conditions are laid out by statute and which are to be observed as a condition for sale. The question to be considered here is what is the approach to be taken in the interpretation of s. 257 of the NLC in relation to the implementation of an order once it has been made under s. 256 of the NLC. The Federal Court in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57 made a reference to a passage of a decision of Lord Denning MR in *Northman v. Barnet Council* [1978] 1 WLR 221 where his Lordship said:

> In all cases now in the interpretation of statute, we adopt such a construction as will 'promote the general legislature purpose' underlying the provision. It is no longer necessary for judges to wring their hands and say: 'There is nothing we can do about it.' Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.

This approach which is described as the purposive approach has been adopted by the Federal Court where Haidar FCJ (as he then was) referred to the assistance that is to be derived by referring to Parliamentary reports or Hansard. He stated (at p. 69) as follows:

> This is permissible as held by the Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285. This is what Edgar Joseph Jr FCJ, speaking for the court, after reviewing a number of cases from different jurisdictions, said at p. 299:
>
> > We have also considered the cogent criticisms of the majority view in *Pepper v. Hart*, by Mr JH Baker in his article entitled *'Statutory Interpretation and Parliamentary Intention'* [1993] 52 Lamb LJ 353; by Mr Brian Devanport in his article entitled *'Perfection – But At What Cost?'* [1993] 109 LQR 149; and Mr David Miers in his article entitled *'Taxing Perks And Interpreting Statutes'* [1993] 56 MCR 695. Nevertheless, have arrived at the conclusion that we should follow the recent trend of the cases decided in the United Kingdom, Australia, New Zealand and Singapore and permit a relaxation of the exclusionary rule by allowing a reference to *Hansard* as an aid to statutory interpretation where the enactment is ambiguous or obscure, or which if literally construed might lead to absurdity and provided always that the statement reported in *Hansard* was made by a Minister or other promoter of a Bill. More particularly, we gratefully adopt the passage in the judgment of Lord Browne-Wilkinson in *Pepper v. Hart*, reproduced above.

His Lordship then referred to the decision in *Pepper v. Hart* [1993] 1 All ER 42 at p. 64 which was quoted by Edgar Joseph Jr FCJ (as he then was) in *Chor Phaik Har*'s case. The passage which was quoted with approval was as follows:

> My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modifications to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of

> which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee any statement other than the statement of the minister or other promoter of the Bill is likely to meet these criteria.

However, we note and agree with the caution put forth by Edgar Joseph Jr FCJ, on the same page as follows:

> We hasten to add, however, that when resort to Hansard is permissible, that by itself although meriting serious consideration cannot be determinative of the issue since it is only available as an aid to interpretation. To hold otherwise would amount to substituting the words of the Minister or other promoter of the Bill for the words of the statute, and that cannot be the law.

We also note that Singapore courts have followed the major judgment in *Pepper v. Hart*. Indeed the rule in *Pepper v. Hart* has now received statutory recognition in Singapore by way of s. 2 of the Interpretation (Amendment) Act 1993. Maybe it is time such a provision given statutory recognition in our Interpretation legislation as with s. 17A referred to earlier. It will give statutory force to the courts to look at the policy speech of the Minister or the promoter of the Bill in *Hansard* for the purpose of an aid to the interpretation of statutes.

Further on at p. 74 Haidar FCJ stated:

> In addition thereto, it is permissible for the courts, as held by the Federal Court in *Chor Phaik Har*, to resort to the Hansard as an aid to interpretation. We can therefore look at the policy speech of the Minister when tabling the Bill for the purpose or the object of the Bill as an aid to interpretation.

Having regard to the above approach, assistance may be sought from the reports pertaining to the second reading of the amendment to the NLC which had been made on 8 May 2001 during which the Minister responsible for Land and Co-operative Development stated, *inter alia*, as follows:

> Tuan Yang di-Pertua, pelaksanaan lelong awam dari peringkat permohonan pemegang gadaian seperti bank dan institusi kewangan sehingga pengagihan hasil lelongan kepada pihak-pihak yang berkenaan adalah diuruskan oleh pejabat tanah. Dan dengan beban kerja yang semakin meningkat, ianya didapati mengambil masa yang panjang. Untuk mengatasi masalah ini, dasar dan prosedur telah disemak semula dan beberapa pindaan kepada Bab 3, Bahagian XVI dibuat supaya lelongan awam dapat diselesaikan dengan lebih cepat.

Dasar utama yang dicadangkan ialah memperluaskan penglibatan bank dan institusi kewangan dengan mempertanggungjawabkan mereka menerima dan menguruskan wang deposit dan keseluruhan hasil jualan tanah yang berkenaan. Prosedur lelongan awam juga diperkemaskan supaya dapat dilaksanakan dengan cepat dan lebih adil kepada tuan tanah. Untuk maksud ini, perkara-perkara penting yang dicadangkan dipinda adalah seperti berikut:

(i) ...

(ii) dalam Perintah Jualan, syarat-syarat baru ditetapkan iaitu setiap orang atau badan yang ingin mengambil bahagian hendaklah mempunyai 10% daripada harga rizab sebagai deposit. Sekiranya harga bayaran sepenuhnya tidak dijelaskan pada masa lelongan, deposit akan dibayar terus kepada pemegang gadaian dan baki dibayar dalam tempoh 120 hari. Tempoh tersebut tidak akan dilanjutkan dan sekiranya bayaran tidak diselesaikan, deposit tersebut akan dirampas dan dibahagikan menurut Seksyen 267A;

(iii) selepas Perintah Jualan Lelongan Awam dikeluarkan pemegang gadaian dengan persetujuan penggadai diberikan satu peluang memohon menangguhkan penjualan bagi tempoh tidak melebihi tiga bulan atau membatalkan Perintah Lelongan Awam menurut seksyen baru 264A sekiranya hutang penggadai dapat diselesaikan pada ketika itu;

(iv) ...

(v) selepas lelongan awam yang berjaya, pemegang gadaian dikehendaki menyediakan suatu penyata mengenai hutang yang ditanggung oleh penggadai seperti tunggakan cukai tanah dan kos urusan mahkamah atau pentadbir tanah berhubung dengan lelongan awam tersebut. Penyata ini akan disampaikan kepada penggadai dengan salinan kepada mahkamah atau Pentadbir Tanah. Penyata ini penting untuk tujuan hasil lelongan oleh pemegang gadaian kepada semua pihak yang terlibat sebaik sahaja bayaran penuh diterima, pemegang gadaian dikehendaki membahagikan hasil jualan itu seperti ditentukan dalam Seksyen 268;

In that statement of the Minister, reference was made that in the order for sale there are terms to be observed when he said "syarat-syarat baru ditetapkan". This is indicative that an order made pursuant to s. 257 constitutes an order of a court made under the RHC and "where it is a perfected order" has to be adhered to in relation to the conditions of sale. Thus, to my mind, once a perfected order has been made and no appeal or application has been made to set aside the order on the basis that there is a cause to the contrary, or as has been explained by Wan Yahya SCJ in the *M & J Frozen Food Sdn Bhd*'s case, the chargor is compelled to abide by the order for the property to be sold in accordance with the statutory safeguard on his interest as provided under ss. 257 and 258 of the NLC. The implementation of the order for sale by

having an auction date fixed and determined, which is part of the original order, relates to a condition of the sale which is connected to the condition that the sale be effected by public auction. The subsequent fixing of the auction dates constitutes consequential orders of the original order for sale. To determine otherwise would amount to allowing the chargor to avoid the term of the order through a back door when he stated that since the auction to be implemented under the first order had been aborted only a judge could determine the subsequent date of auction, if any.

There are certain observations in the case of *Malayan United Finance Bhd. v. Adsonii (M) Sdn Bhd* [1990] 2 CLJ 254; [1990] 2 CLJ (Rep) 435 which could be mentioned here. In that case the defendant/chargor appealed from the decision of a senior assistant registrar which was given on 3 November 1969 whereby she had made various consequential orders following an order made under s. 256 of the NLC which had previously been made by a judge upon an application of the plaintiff/chargee. There were arguments urged by counsel for the chargor/defendant in that case about an increase of the reserve price as there were three abortive auctions. Edgar Joseph Jr J (as he then was) referred to the decision of the senior assistant registrar regarding the reserve price and in that case (while the judge had increased the reserve price) his views on another order made by the senior assistant registrar permitting the chargee/plaintiff to bid at the auction that was to be held are instructive:

> As for the order made by the Senior Assistant Registrar permitting the Chargee/Plaintiff to bid at the auction, I consider that this was merely an order consequential to the Order for Sale made under s. 256 of the Code by me 21 November 1985, and **so well within the jurisdiction of the Senior Assistant Registrar to make.** The principle of *functus officio* cannot possibly apply to consequential orders. The Senior Assistant Registrar, be it noted, has very ample powers which are spelt out in O. 32 r. 9, of the Rules of the High Court 1980, the effect of which is that the jurisdiction of the Registrar is equated to that of a Judge in Chambers except matters which the Chief Justice may direct or which under the rules may only be transacted by a Judge; neither of these exceptions was relevant to the present case. Moreover, it should not be overlooked, in making the order permitting the chargee/applicant to bid at the auction, the Senior Assistant Registrar was merely **acting as a delegate for the Judge**. (emphasis added)

The views of Edgar Joseph Jr J in the *Malayan United Finance* case show that where auctions pursuant to orders made under sub-s. 257(1)(b) NLC do not proceed on the dates fixed for a variety of reasons, could again take place with the fixing of a new auction date to be effected by a senior assistant registrar as the senior assistant registrar acts as a delegate for the judge. The Practice Direction No. 5 of 1989 is therefore in consonance with O. 32 r. 9

RHC. Of course by virtue of sub-s. 257(1)(b) in the original order for sale since the matter in the first place and at the outset is always adjudicated by a judge it has to be the judge who fixes the auction date and this is vested in the judge under sub-s. 257(1)(b) NLC. However, where no auction was carried out as in this case, in my view, a subsequent order to fix an auction date still constitutes a consequential order and does not concern an alteration of the original order that the sale, in any case, is to be carried out by public auction. I therefore also accept as correct the contention of the counsel for the appellant/plaintiff in this case that sub-s. 259(2)(c) is applicable only in the situation that where an auction date has been fixed and on that date an auction is carried out and no bid is made at or above the reserve price the auction has to be aborted. Moreover in my view the effect of s. 257 is also distinguishable from s. 263 of the NLC. An order for sale under s. 263 may be postponed only once. In any case even sub-s. 264(4)(A) does not preclude the making of a fresh application. Section 256 NLC specifically indicates that the application for an order for sale under that section is regulated and subject to "any law for the time being in force relating to civil procedure" and the RHC remains the governing provision that regulates the making of the order for sale while ss. 258 and 259 relate to procedure for the implementation of the order for sale. It is also to be noted that Form 16H which was introduced *vide* an amendment to the NLC indicates that the order for sale at the instance of a chargee is such the form itself has to be signed by the registrar of the court. The effect of the amendment is, to my mind, simply to affirm that while the order for sale is an order made pursuant to O. 83 RHC when a copy of the order which has been made is to be served on the chargor, the copy would have to conform in material particulars to Form 16H and that order would have to be signed by the registrar of the court.

Again this also indicates that s. 258 is in consonance with the provisions of O. 32 r. 9 RHC where as explained by Edgar Joseph Jr J in the *Malayan United Finance* case that in carrying out the order, the statutory duty of the registrar of the court to give effect to the order for sale is also as a delegate for the judge. The expression used in s. 257 NLC is that the order for sale made by the court under s. 256 shall be in Form 16H and yet the actual form itself indicates that the form is to be signed by the registrar. This also goes to show that there are two parts when an order for sale is made. The first part is at the stage where the order is made by the judge in the event that the chargor fails to raise any cause to the contrary and the second part is the stage where after the order has been made, the registrar of the court has to conform to the procedure prior to the sale.

With regard to the use of the word "shall" in s. 257 NLC reference could be made to NS Bindra's *Interpretation of Statute*, 8th edn. (pp. 590-591):

> Whether a statute is mandatory or directory, depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intentions of the Legislature are the governing factor, and these are to be ascertained not only from the phraseology of the provision but also by considering its nature, its design and the consequences which would follow from construing it one way or the other. In determination of the question whether a provision of law is directory or mandatory the prime object must be to ascertain the legislative intent, from a consideration of the entire statute, its nature, its object and the consequences that would result from construing it in one way or the other, or from such statute in connection with other related statutes, and the determination does not depend on the form of the statute. "It appears to be well settled that in order to judge the nature and scope of a particular statute or rule, ie, whether it is mandatory or directory, the purpose for which the provision has been made, and its nature, the intention of the Legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory. Further to this end, an enquiry into the purpose behind the enactment of the Legislature must always be made. The mandatory language of an enactment by itself affords no justification for the conclusion that its provisions are always imperative in the sense that any act done in violation will be invalid. No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of the Court to get at the real intention of the Legislature by carefully attending to the whole scope of the enactment. The legislative mandate must be considered as mandatory not merely because of the language employed therefore, but also in view of the purpose behind the provision in question.

And as already mentioned above the purpose of the amendment is to ensure that the conditions of the sale are to be observed and the schematic provisions relating to the procedure to be observed before the sale takes place are laid down in ss. 258 and 259 NLC where specific mention is made to the statutory powers of the registrar, who is also referred to as the officer under whose direction the sale takes place under ss. 258 and 259 respectively.

Having elaborated as above I also find that the Practice Directions referred to by counsel for the plaintiff/appellant namely Practice Direction No. 2 of 1987 and Practice Direction No. 5 of 1989 are not inconsistent with the provisions of the RHC and as indicated in the decision of Steve Shim CJ (Sabah & Sarawak) "once practice directions have been properly and legally issued they must be complied with."

I do not find those Practice Directions in any way in conflict with the provisions of ss. 256, 257, 258 and 259 NLC. I would even adopt the approach as expressed in F Bennion's *Statutory Interpretation A Code,* 2nd edn. (pp. 167-168):

> There are various types of delegated legislation, but all are subject to certain fundamental restraints. Underlying the whole concept of delegated legislation is the basic principle that the legislature delegates because it cannot directly exert its will in every detail. All it can in practice do is lay down the outline. This means that the intention of the legislature, as indicated in the outline (that is the enabling Act), must be the prime guide to the meaning of delegated legislation. In the Code this is referred to as the rule of primary intention.
>
> COMMENT
>
> The main reason why the legislature delegates is that it cannot itself go into sufficient detail. The answer is a two-tier Act, sometimes known as a skeleton Act or what Sachs J called a streamlined Act. The top tier is laid down by Parliament in the Act itself. The second tier is laid down in delegated legislation, which can easily be adjusted in the light of experience of its working. But the intention of the legislature, as indicated in the Act conferring the delegated power, must always be the prime guide to the meaning of the delegated legislation.
>
> The delegate is not intended to travel wider than the object of the legislature. The delegate's function is to serve and promote that object, while at all times remaining true to it. That is the rule of primary intention.
>
> The following; version of the rule, as stated in an Australian case, was endorsed by the Judicial Committee of the Privy Council in *Utah Construction and Engineering Pty Ltd v. Pataky* [1966] 2 WLR 197 at 202:
>
> > (Power delegated by an enactment) does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorize the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary its ends.
>
> The court will assume that the delegate intended to conform to the rule of primary intention, and will construe ambiguous provisions in the instrument accordingly. In other words, the courts will not be astute to ascribe to the person by whom the (delegated) legislation was made an intention to make *ultra vires* provision.

As already elaborated earlier the NLC itself has established that the order for sale is to be done in accordance with the RHC. Having explained as above it is clear to my mind that the dates that have been fixed by the registrars are consistent with the exercise of powers that have been accorded statutory recognition pursuant to O. 32 r. 9 RHC read with O. 92 r. 3B (and in respect of the latter the relevant practice directions have been issued). Accordingly, the registrars have been duly empowered to undertake their functions which are clearly accorded to them under ss. 258 and 259 NLC. The Practice Directions are in consonance with the NLC where the registrars are vested with the power to deal with the consequential orders that are to be made after an order for sale has been made by a judge under s. 256 NLC.

The Res Judicata Argument

A preliminary point that deserves mention is para. 11 found in the Schedule to the Courts of Judicature Act 1964 ('CJA') which is to be read with s. 25 of the CJA in relation to the powers of the High Court whereby under sub-s. (2) the High Court is to have additional powers set out in the Schedule. Paragraph 11 provides as follows:

> **11 Res Judicata**
>
> Power to dismiss or stay proceedings where the matter in question is *res judicata* between the parties, or where by reason of multiplicity of proceedings in any court or courts the proceedings ought not to be continued.

I need to also mention from the outset that in this matter before me it is not a case of the appellant/plaintiff requiring that the proceedings be stayed. It is the reverse situation where the respondent/defendant, by his conduct, is disclosing every attempt to impede the implementation of the order that was given 14 years ago and the discretion of this court is to be exercised to establish whether the issues raised by the respondent/defendant are issues that hitherto have been dealt upon or could have already been dealt upon earlier on.

Counsel for the appellant/plaintiff had argued that the objections or issues raised by the respondent/defendant are *res judicata*. This point has been dealt with in *OCBC Bank (M) Bhd v. Kredin Sdn Bhd* [1997] 2 CLJ 534. In that case the respondent/chargor had sought to raise the issue of interest which was payable – a matter which was not raised before the judge who granted the order for sale in a second auction. While the respondent/chargor had appealed against that decision (ie, the order for sale) that appeal was subsequently withdrawn. Instead, the respondent/chargor made an application to set aside the order for sale.

On the issue of interest, Abdul Malek Ahmad JCA (as he then was) observed:

... the amount claimed by the appellant in the charge action in which interest is levied has to be deposed to on affidavit. All other relevant documents, namely the statutory notice, the originating summons, the affidavit in support and the affidavit filed under O. 83 of the RHC had raised and sought the interest. This was, therefore, a material issue in the course of the charge action and the respondent should have stated their stand then or at the appeal which they subsequently withdrew.

Learned counsel for the respondent, with his usual candour, remarked that they were not the solicitors in charge when the order for sale and when the withdrawal of the appeal in the second action took place. He reiterated that none of the issues now submitted were raised then and the third action had nothing to do with the issue they were raising now for the first time which was unjust enrichment. In that earlier action, he stressed, the action was for damages for fraud and other grounds, different from the one raised now, and one of the remedies was to set aside the order for sale.

He argued that *res judicata* is only as regards cause of action estoppel, not remedy estoppel as an order for sale is not a judgment as decided in *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332 and since this was an application under O. 18 r. 19 of the RHC, he added, as long as the respondent can show an arguable case, the action should remain. He also submitted that the order for sale had since been stayed.

He had cited para. 73 of the judgment of the Federal Court in *Loh Holdings Sdn Bhd v. Peglin Development Sdn Bhd & Anor* [1984] 2 CLJ 88; [1984] 1 CLJ (Rep) 211 which was actually an extract of the judgment from the Australian case of *Brisbane City Council & Anor v. A-G for Queensland* [1978] 3 All ER 30; [1979] AC 411. Wan Sulaiman FJ had said:

> The defence of *res judicata* was considered and disposed of at p. 425 (of *Brisbane City Council & Anor v. A-G for Queensland* [1979] AC 411), and we cite:
>
> > The second defence is one of *res judicata*. There has, of course, been no actual decision in litigation between these parties as to the issue involved in the present case, but the appellants invoke this defence in its wider sense, according to which a party may be shut from raising in a subsequent action an issue which he could, and should, have raised in earlier proceedings. The classic statement of this doctrine is contained in the judgment of Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100 and its existence has been reaffirmed by this Board in *Hoystead v. Commissioner of Taxation* [1926] AC 155. A recent application of it is to be found in the decision of the Board in Y*at Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581. It was, in the judgment of the Board, there described in these words:

> ... there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings.
>
> This reference to "abuse of process" had previously been made in *Greenhalgh v. Mallard* [1947] 2 All ER 255 per Somervell LJ and their Lordships endorse it. This is the true basis of the doctrine and it ought to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut from bringing forward a genuine subject of litigation.
>
> In their Lordships' opinion there is no room for application of this doctrine here.

Learned counsel had also quoted a passage from *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 which states:

> It is well settled law that the exercise of such a discretion will be interfered with by an appellate court only in exceptional circumstances; for example, where it has been demonstrated that the decision of the judge below is shown to have depended on an erroneous basis of law or fact or where no reasonable explanation is open save that the decision depended on an erroneous basis of law or fact. More particularly, the fact that we as an appellate court might have exercised the discretion differently is beside the point and will not therefore constitute a sufficient ground for overturning the judge's decision to grant the limited stay.

In reply, learned counsel for the appellant likened a situation where a client sues a solicitor for negligence. There are two causes of action, he said, in contract and in tort. What if the client sues the solicitor in contract and the action is dismissed. Can he file another action on the same facts in tort? Similarly here, he pointed out, the grounds in the fourth action to set aside the order for sale may be different but this cause of action could have been framed in the third action.

He relied on *C (A Minor) v. Hackney London Borough Council* [1996] 1 WLR 789 at pp. 792 and 793 where Simon Brown LJ said:

> Before turning to consider these reasons and counsel's arguments upon the appeal, it is convenient first to indicate something of the law governing this issue. From the several authorities referred to during the course of argument, I derive these central principles:
>
> (1) The consideration of public policy underlying the plea of *res judicata* are enshrined in two Latin maxims, *nemo debet bis vexari pro una et eadem causa* and interest *reipublicae ut sit finis litium*,

(2) The plea of *res judicata* encompasses two distinct forms of estoppel: cause of action estoppel and issue estoppel.

(3) 'Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case, the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment': See *Arnold v. National Westminster Bank Plc* [1991] AC 93 at p. 104.

(4) Issue estoppel represents an extension of the doctrine of *res judicata* to include a bar on the subsequent litigation not only of all decided issue whose resolution was essential to the determination of earlier proceedings but also 'to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time': see *Fidelitas Shipping Co Ltd v. V/O Exportchleb* [1966] 1 QB 630 at p 643, per Diplock LJ, quoting from *Henderson v. Henderson* [1843] 3 Hare 100 p 115. As Lord Keith of Kinkel put it in *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93, 106:

> Issue estoppel, too, has been extended to cover not only the case where a particular point has been raised and specifically determined in the earlier proceedings, but also that where in the subsequent proceedings it is sought to raise a point which might have been but was not raised in the earlier.

(5) 'The point' which might have been but was not raised in the earlier proceedings may itself be a cause of action. In *Talbot v. Berkshire County Council* [1994] QB 290 at p. 301, Mann LJ spoke of the rule as 'a salutary one,' observing that 'it prevents prolixity in litigation and encourages the earliest resolution of disputes'.

(6) In issue estoppel cases, the plea of *res judicata* will not be applied where to do so would cause injustice. The 'special circumstance' (the phrase used in several of the authorities) justifying the non-application of the rule ordinarily arise where further material becomes available which could not by reasonable diligence have been adduced in the earlier proceedings, or where (as in *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93) there has been a change or changed perception of the law.

(7) The plea of *res judicata* applies only where the cause of action or issue was and remains between the same parties or their predecessors in title. The single exception to this rule is to be found in the Privy Council decision in *Yat Tung Investment Co Ltd v. Dao Heng Bank*

Ltd [1975] AC 581, where the party held estopped in the subsequent proceedings had not itself been a party to the earlier action.

It was, however, a closely related company with common directors and shareholders.

Learned counsel also referred to the latest Malaysian authority on this point. In *Low Lee Lian v. Ban Hin Lee Bank* [1997] 2 CLJ 36, it was propounded at p. 55 that:

> When properly understood, there is therefore nothing in the decision in *Kandiah* that permits a chargor in a subsequent action to set aside an order for sale granted by the court *inter partes*. That may not be done in the absence of an allegation of fraud in the procurement of the order. See *Hock Hua Bank Bhd v. Sahari bin Murid* [1981] 1 MLJ 143. If a chargor is unhappy with an order for sale made *inter partes*, his only remedy is to appeal against it as has been done in the present case. All that *Kandiah* decides is that the making of an order for sale does not bar an action *in personam* between the same parties.

Learned counsel for the Respondent submitted that *Low*'s case contradicted O. 83 r. 3 of the RHC. He said there was special circumstances here, citing *Richland Trade & Development Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1996] 4 MLJ 233 as a case on point.

The Federal Court in *Low Lee Lian v. Ban Hin Lee Bank Bhd* [1997] 2 CLJ 36 explained the decision of *Kandiah Peter v. Public Bank Bhd* [1993] 4 CLJ 332 where the latter decision is to the effect that doctrine of *res judicata* cannot apply where the previous proceedings were only charge action which did not result in a final judgment or order. With reference to this the clarification that was given in the *Low Lee Lian*'s case by Gopal Sri Ram JCA is as follows:

> We must confess our inability to discern any 'wider proposition' that *Kandiah* establishes. All that case did was to reaffirm well-established principles. At the risk of repetition, we emphasize that, by their very nature, proceedings under s. 256 are not concerned with any contractual claims that the chargor may have against the chargee. They are concerned with the very narrow and limited questions whether the chargor has adduced facts that establish cause to the contrary in the sense we have earlier discussed. If the chargor is unable to sustain his opposition to the making of an order for sale – a proceeding *in rem* – he may nevertheless sue the chargor *(sic.) in personam* for breach upon the personal covenant or in equity for such relief as may be appropriate. The issue in the latter action is whether facts emerge that reasonably support a breach of contract or an equitable remedy such as an action for an account. Such an action will, of course, be subject to all available defences, at law and in equity, and to the wide discretion of the court to refuse specific relief in the exercise of discretion according to settled principles.

When properly understood, there is therefore nothing in the decision in *Kandiah* that permits a chargor in a subsequent action to set aside an order for sale granted by the court *inter partes*. That may not be done in the absence of an allegation of fraud in the procurement of the order. See *Hock Hua Bank Bhd v. Sahari bin Murid* [1991] 1 MLJ 143. If a chargor is unhappy with an order for sale made *inter partes*, his only remedy is to appeal against it as has been done in the present case. All that *Kandiah* decides is that the making of an order for sale does not bar an action in personam between the same parties.

In our judgment, the problem falls to be resolved by reference to the doctrine of estoppel. It matters not what form the estoppel takes. It may take the form of a plea of *res judicata* or cause of action estoppel or issue estoppel in the sphere of adjectival law. It may appear in some other form to affect rights that may exist under substantive law. Whatever its label, there are certain basic features that are inextricably woven into the fabric of the doctrine.

One such feature is mutuality or reciprocity. For estoppel to apply, it must bind both parties to a dispute. If, for any reason, only one party will be estopped but not the other, if their roles were reversed, then the doctrine does not bite. See *Gaunt v. Wainman* [1836] 132 ER 335; *Fosfer v. Mentor Life Assurance Co* [1854] 118 ER 1058; *Concha v. Concha* [1886] 11 App Cas 541 at p 553, per Lord Herschell LC; *Simm v. Anglo-American Telegraph Co* [1879] 5 QBD 188 at p 203, per Bramwell LJ.

An examination of the legal position reveals that the requirement of reciprocity is not met in relation to proceedings under s. 256 of the Code.

Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings *in rem* under s. 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See *China and South Sea Bank Ltd v. Tan* [1989] 3 All ER 839 at p. 842.

Thus, in the absence of any special circumstances, a chargee who has obtained an order for sale is not barred by *res judicata* or any other form of estoppel from pursuing actions *in personam* against the chargor or the surety. The test of mutuality or reciprocity is, accordingly, not met. Consequently, no legitimate ground may be advanced to bar the chargor from mounting an action *in personam* against the chargee, eg for breach of contract or for failure to furnish proper accounts.

When viewed from this standpoint, it is plain that the decision in *Kandiah* is not only correct but also just.

> Where an order for sale is made in the absence of the chargor, then, the court is not *functus officio* for the purposes of hearing an application by the chargor to set it aside. See *United Malayan Banking Corp Bhd v. Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352. We are not prepared to – indeed we cannot – predict all the issues that may arise upon such an application. Each case depends on its own facts. However, we will go so far as to say that one of the issues that will certainly arise upon such an application will be whether the chargor has established cause to the contrary.
>
> Once these elementary propositions of law are understood, there need be no fear of confusion or of floodgates.

It would also appear that in the *OCBC Bank (M) Bhd*'s case Abdul Malek Ahmad JCA had observed (at pp. 544-545) that the chargor was not seeking to impeach the earlier order for sale but was only seeking to challenge the validity of the charged documents and the subsequent civil proceedings in which the doctrine raised was the first after the order for sale. The facts in the present case indicated that when the appeal was made by the respondent/defendant against the decision of the deputy registrar of 17 October 2000 for having fixed a new auction date that was to have taken place on 12 December 2000, the respondent/defendant must have very well known that the purpose for which such an application was made was to have a consequential order to be made by the deputy registrar and at that time the respondent/defendant could have easily stated that the auction date was also to have been determined by the judge at the time of the appeal. This is a point to be taken as nothing new as all subsequent orders are consequential upon an order for sale which as had been explained above was well within the jurisdiction of the registrar. Therefore, in failing to take this point up before the judge, the respondent/defendant is therefore now precluded from advancing the contention that the matter should now be fixed before a judge.

Halsbury's Laws of England, vol. 16 4th edn. Reissue at para. 974 the following is stated:

> The doctrine of *res judicata* is not a technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation. It will therefore be convenient to follow the ordinary classification and treat it as a branch of the law of estoppel.
>
> Where *res judicata* is pleaded by way of estoppel to an entire cause of action, rather than to a single matter in issue, it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment, which may have involved the determination of questions of law as well as findings of fact.

Res judicata has also been considered in the case of *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 326 in which Gopal Sri Ram JCA in delivering the decision of the Court of Appeal stated:

> Now, *res judicata* is not merely a technical rule of pleading. It is a doctrine of substantial justice. It is a process whereby justice is achieved procedurally by precluding a party from re-agitating in subsequent proceedings a complaint or an issue that has, or could fairly have, been disposed in earlier proceedings between the same parties or their privies. It is merely equity in action in the procedural arena. It is sometimes referred to as the rule in *Henderson v. Henderson* [1843] 67 ER 313. In that case, Wigram V-C said:
>
> > In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> The doctrine may thus be seen to encompass several categories. In its narrowest sense, *res judicata*, I think, refers to estoppel by record. It refers to the actual decision the earlier action or proceeding. In its wider sense, it encompasses issues, and causes of action that could justly and fairly have been equally adjudicated in the earlier suit or proceeding. This wider operation of the doctrine is sometimes referred to "constructive *res judicata*". It houses the twin concepts of issue estoppel and cause of action estoppel. Like the tree of which they form the branches, they are designed to ensure that there is finality in litigation.
>
> Pausing for a moment, I think that it is essential to bear in mind that Wigram V-C spoke these words in the Court of Chancery and that the court he referred to was that court, of which he was the Vice-Chancellor at the time. I make mention of these matters in order to demonstrate that the doctrine of *res judicata* has its roots in equity and hence retains its discretionary nature that is common to all equitable doctrines.

Now, there is a dimension to the doctrine of *res judicata* that is not always appreciate. It is this. Since the doctrine (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result. And there is respectable authority in support of the view I have just expressed.

In *Carl-Zeiss-Stiftung v. Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 532, 573, Lord Upjohn said:

> As my noble and learned friend, Lord Reid, has already pointed out there may be many reasons why a litigant in the earlier litigation has not pressed or may even for good reasons have abandoned a particular issue. It may be most unjust to hold him precluded from raising that issue in subsequent litigation (and see Lord Maugham LC's observations in the *New Brunswick* case ([1938) 4 All ER at p. 755; [1939] AC at p. 21)). *All estoppels are not odious but must be applied so as to work justice and not injustice, and I think that the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind.* (emphasis added)

In *Arnold v. National Westminster Bank Plc* [1991] 2 AC 93, 109, Lord Keith of Kinkel expressed the following view:

> In my opinion your Lordship should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involved in the earlier proceedings, whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. *One of the purposes of estoppel being to work justice between the parties. It is open to courts to recognise that in special circumstances inflexible application of it may have the opposite result,* as was observed by Lord Upjohn in the passage which I have quoted above from his speech in the *Carl-Zeiss* case [1966] 2 All ER 536 at 573, [1967] 1 AC 853 at 947. (emphasis added)

In a later passage, I find Lord Keith saying:

> Estoppel *per rem judicatam*, whether cause of action estoppel or issue estoppel, is, essentially concerned with preventing abuse of process. In the present case I consider that abuse of process would be favoured rather than prevented by refusing the respondent's permission to reopen the disputed issue.
>
> These views were very recently reaffirmed by the House of Lords in *Johnson v. Gore Wood & Co* [2000] (Unreported, speeches published on 14 December 2000). See, in particular the speech of Lord Bingham of Cornhill, at pp. 8-10 of the transcript.

> On the authorities discussed thus far, the principle comes to this. Whether *res judicata* in the wider sense should be permitted to bar a claim is a matter that is to be determined on the facts of each case, always having regard to where the justice of the individual and particular case lies.

The judgment of *Low Bee Lian* has amply covered the aspect of *res judicata*. I find therefore that the respondent/defendant has failed to show that it has not exhausted whatever avenues in relation to the implementation of the original order and this leads me to the final contention of the appellant/plaintiff that the conduct of the respondent/defendant resulting in the deputy registrar in arriving at a decision that he has no jurisdiction was *mala fide*.

The Mala fide Conduct

The argument of the appellant/plaintiff that the conduct of the respondent/defendant was *mala fide* is based on the fact that certain judgments had been obtained before another High Court in Civil Suit No. S5-21-165-1998 whereby the appellant/plaintiff in this case was a defendant in Civil Suit No. S5-21-165-1998 ([2001] 7 CLJ 500). The facts in that case are not really related to the present circumstances as on facts of that case the judge had found that the plaintiff then (who is now the respondent/defendant in this case) had deceived the controller of housing appointed under the Housing Developers (Control and Licensing) Act 1966 by undertaking development without licence and the plaintiff therefore was prevented from pleading their very own act of illegality for having infringed the 1973 Act for the sole purpose of asking and imploring the court to set aside the loan facility and to strike down the order for sale without having to make any repayment to the first defendant then (now the appellant/plaintiff). In the course of his judgment, Abdul Malik Ishak J had to deal with the argument of the defendant concerning instances of *mala fide*. The instances of *mala fide* in that case were circumstances where the plaintiff then had in that suit sold the subdivided titles of master titles of certain lands to various purchasers and yet the plaintiff had failed to fulfil his obligation to the purchasers under the sale and purchase agreement. There the High Court found that the chronology of events had shown that there was *mala fide* on the plaintiff's part and the purchasers were found to have become victims of the plaintiff's deception.

The following are the relevant observations of the learned judge:

> This was a sad tale of the plaintiff deceiving the defendants and using our judicial process to suit his whims and fancies. The rights of the first defendant and the purchasers have been prejudiced for more than 20 years after taking into account that the first sale of the land took place in 1973. The consent order recorded by NH Chan J (as he then was) on 13 March 1998 was a

> mere paper judgment. The plaintiff was certainly heartless. In order to obstruct the settlement reached between the first defendant and the purchasers, the plaintiff had filed this suit and had applied to stay the auction of those lands. It must be recalled that the plaintiff had made four applications to stay the auction for Grant 7188 of Lot 94 to three different High Courts in Kuala Lumpur as well as to the Court of Appeal and all these four applications have been dismissed with costs. It was part and parcel of my judgment that all the issues raised by the plaintiff in the present suit have been raised by him in those four stay applications. It was also my judgment, that the plaintiff's conduct showed that his claim was *mala fide* and it was an abuse of the process of the court.

What the learned judge had deplored in his judgment as to the use of judicial processes where the use of the processes in effect amounts to an abuse of the process of the court could well be echoed in the circumstances of the present matter before me. The conduct of the respondent/defendant in the present case has shown that the fixing of auction dates had transpired on several occasions and that alone would have given ample opportunity for the respondent/defendant to lodge any objection to the exercise of the statutory powers of the registrar under s. 257 NLC. The events on 17 October 2000 was also an occasion where the respondent/defendant had failed to submit any point on the matter of exercise of jurisdiction and again there was more than ample opportunity that at the time an appeal against the fixing of the reserve price was heard before a judge on 7 November 2000 there was nothing to preclude the respondent/defendant from including in his submissions relating to the fixing of the reserve price any other consequential matters relating to the condition of sale. One could discern that the conduct of the respondent/defendant was a conduct that was calculated to impede the execution of the order in a very unreasonable manner.

In *Halsbury's Laws of England,* 4th edn. Reissue Vol. 37 it is stated at para. 931 as follows:

> 931 **Abuse of process.** The most important ground on which the court exercises its inherent jurisdiction to stay proceedings is that of abuse of process. This is a power which, it has been emphasised, ought to be exercised sparingly and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the claimant might not, or probably would not, succeed, but that he could not possibly succeed on the basis of the pleadings and the facts of the case.
>
> **It is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings.**

A party may be guilty of an abuse of the process of the court even though he may comply with the strict literal terms of an applicable rule of law, where he does so for improper or ulterior motives or purposes. (emphasis added)

It is useful to refer to the decision in *Yat Tung Co. v. Dao Heng Bank Ltd. & Anor* [1975] 2 WLR 690 for purposes of elucidating the abuse of process. I find it necessary to set out the facts of the case as found in the headnotes:

The owners of a property borrowed money from the first respondent (the bank) which loan was charged upon the property. The owners defaulted on payment of the loan interest due to the bank and absconded. The bank, in exercise of its rights, sold the property to the appellant. The bank assigned the property, pursuant to the sale, to the appellant and the appellant borrowed money from the bank on the security of a mortgage of the property. The appellant defaulted on the payment of interest under the mortgage and the bank exercised its right of sale thereunder and sold the property to the second respondent. The appellant brought an action against the bank (no. 696 of 1969) claiming that the sale of the property to it was a sham; that the property had been conveyed to it as trustee for the bank and the mortgage was accordingly a nullity. The bank denied that the sale was a sham and counterclaimed for the loss suffered on the re-sale of the property to the second respondent. The court dismissed the appellant's claim and upheld the bank's counterclaim. One month after that judgment the appellant brought an action against the bank and the second respondent (no. 534 of 1972) claiming that the sale by the bank to the second respondent was void or voidable as fraudulent in that the bank and the second respondent "were in fact essentially one certain interest and/or alternatively acting in concert with a common design calculated to obtain the ... property at a low price and to extinguish the plaintiff's interest therein." The bank and the second respondent applied by summons for an order that the statement of claim be struck out as *(inter alia)* being vexatious, frivolous and/or otherwise an abuse of the process of the court. The judge held that the allegation of fraud and the voidability of the sale by the bank to the second respondent were matters which were available for litigation in action no. 969, and ordered that the statement of claim be struck out. The order striking out the statement of claim was affirmed by the Full Court.

On appeal to the Judicial Committee:

Held, dismissing the appeal, that there was no reason why a defence impugning the *bona fides* of the sale by the bank to the second respondent could not have been pleaded as a counterclaim to the counterclaim in action no. 969; that, accordingly, the doctrine of *res judicata* in its wider sense applied and it would be an abuse of the process of the court to raise in subsequent proceedings matters which could and should have been litigated in the earlier proceedings.

In the course of the judgment delivered by Lord Kilbrandon reference was made to the application of a doctrine of estoppel namely *res judicata*. The part of his Lordship's ruling which is material for the purposes of the present case is as follows:

> Their Lordships agree with the view expressed by McMullin J. that the true doctrine in its narrower sense cannot be discerned in the present series of action, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of *res judicata* is the judgment of Wigram V.C. in *Henderson v. Henderson* [1843] 3 Hare 100, 115, where the judge says:
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> > ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
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> The shutting out of a "subject of litigation" – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule. For example, if it had been suggested that when the counterclaim in no. 969 came to be answered Mr. Lai was unaware, and could not reasonably have been expected to be aware, of the circumstances attending the sale to Choi Kee, it may be that the present plea against him would not have been maintainable. But no such averment has been made.
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> The Vice-Chancellor's phrase "every point which properly belonged to the subject of litigation" was expanded in *Greenhalgh v. Mallard* [1947] 2 All ER 255, 257, by Somervell LJ:

> ... *res judicata* for this purpose is not confined to the issues which the court is actuary asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.

In the decision in the case of *Johnson v. Gore Wood & Co (a firm)* [2001] 1 All ER 481 House of Lords has also the occasion to elaborate further on the subject matter of abuse of process where Sir James Wigram V-C's views in *Henderson v. Henderson* as dwelt upon in *Yat Tung*'s case, was also reiterated and further elaboration is also found in the judgment of Lord Bingham of Cornhill.

On abuse of process Lord Bingham of Cornhill stated:

> The rule of law depends upon the existence and availability of courts and tribunals to which citizens may resort for the determination of differences between them which they cannot otherwise resolve. Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court (*Yat Tung Investment Co Ltd v. Dao Heng Bank Ltd* [1975] AC 581 at 590, [1975] 2 WLR 690 at 696 per Lord Kilbrandon, giving the advice of the Judicial Committee; *Brisbane City Council v. A-G For Queensland* [1978] 3 All ER 30 at 36, [1979] AC 411 at 425 per Lord Wilberforce, giving the advice of the Judicial Committee). This does not, however, mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in *Hunter v. Chief Constable of West Midlands* [1981] 3 All ER 727 at 729, [1982] AC 529 at 536, an:
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> > inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.
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> One manifestation of this power was to be found in RSC Ord 18, r 19, which empowered the court, at any stage of the proceedings, to strike out any pleading which disclosed no reasonable cause of action or defence, or which was scandalous, frivolous or vexatious, or which was otherwise an abuse of the process of the court.

Further on his Lordship continued at p. 491:

> ... the abuse in question need not involve the reopening of a matter already decided in proceedings between the same parties, as where a party is estopped in law from seeking to re-litigate a cause of action or an issue already decided in earlier proceedings, but (as Somervell LJ put it in *GreenHalgh v. Mallard* [1947] 2 All ER 255 at 257) may cover:
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> > issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.
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> A series of cases, mostly in recent years, has explored this form of abuse. Reference need not be made to all of them. In the *Yat Tung* case abuse was found where a claimant who had unsuccessfully sued a bank on one ground brought a further action against the same bank and another party on a different ground shortly thereafter. Giving the advice of the Judicial Committee of the Privy Council, Lord Kilbrandon said:
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> > The second question depends on the application of a doctrine of estoppel, namely *res judicata.* Their Lordships agree with the view expressed by McMullin J that the true doctrine in its narrower sense cannot be discerned in the present series of actions, since there has not been, in the decision in no. 969, any formal repudiation of the pleas raised by the appellant in no. 534. Nor was Choi Kee, a party to no. 534, a party to no. 969. But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. (See [1975] AC 581 at 589-590, [1975] 2 WLR 690 at 696.)

Lord Bingham of Cornhill also cited with approval, the advice of the Judicial Committee of the Privy Council as stated by Lord Kilbrandon as cited above. Lord Bingham of Cornhill also referred to "what is now taken to be the rule in *Henderson v. Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*" where his Lordship stated:

> But *Henderson v. Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or

> defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before; abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. ... While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interest of justice.

As indicated earlier the Court of Appeal has already applied this approach in *Chee Pok Choy*'s case.

In the present case before me the abuse of process raised is observed with regard to the proceedings on 29 July 2002 before the registrar where the respondent/defendant has put into issue the question of the power of the registrar to fix an auction date. To my mind there is an abuse of process of a procedure where the argument advanced by the respondent/defendant that the date of auction has to be fixed by a judge could already in substance as well as procedure have been brought up earlier not only at the time the appeal was lodged against the decision of the deputy registrar in fixing the reserve price but at any prior proceedings where attempts have been made to fix auction dates.

After having taken into account the circumstances of the case as well as the chronology of the events leading to this appeal having been made by the appellant/plaintiff I find that the respondent/defendant has shown by conduct that with the knowledge of an auction date having been fixed, the respondent/defendant is endeavouring once again to use the mechanism of judicial process at every turn and opportunity to athwart the implementation of an order that has been delivered fourteen years ago and in respect of which

the respondent/defendant has hot been able to indicate that there was any cause to the contrary against the order being made. I take the risk of repetition to reiterate once again that no attempt whatsoever was made to appeal in the first instance against the original order. Instead several turns were taken to prolong the implementation of an order in a manner which is tantamount to an abuse.

Finally before giving an order on this appeal made by the appellant/plaintiff I wish to add that it is settled law that in exercising my discretion on this appeal I am not fettered in any way by the earlier exercise of the registrar's discretion as it is noted that the registrar gave only a bare decision or a simple *ipse dixit* and not at all a judgment. This aspect has been elaborated in *Seloga Jaya Sdn Bhd v. Pembenaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 CLJ 716. It is somewhat regrettable that in this case if there had been any doubt by the registrar the matter could have been referred to the judge as provided under O. 32 r. 10 and this matter could have been disposed of without engaging the parties and, a *fortiori*, the court in a waste of precious time and the engagement of unnecessary multiplicity of proceedings.

The end result is that I find that the deputy registrar had erred in coming to a decision that he had no jurisdiction to fix an auction date. The appeal allowed with costs as prayed for in encl. (150) and the matter is accordingly to be sent back to the deputy registrar responsible for such a matter with the direction to fix an auction date and other related matters in accordance with the provisions of the NLC for the purpose of implementing the original order.